88-126

Supreme Court, U.S.
FILED
JUL 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE

Supreme Court Of The United States

October Term, 1988

OLIVER MARSHALL, et al.,
Petitioners,

v.

WESTERN GRAIN COMPANY, INC.,
AND THE RIVERSIDE GROUP, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT L. WIGGINS, JR.
RICHARD EBBINGHOUSE
Gordon, Silberman, Wiggins
and Childs
1500 Colonial Bank Building
Birmingham, Alabama 35203
(205) 328-0640

Counsel For Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. By taking as true the allegation that severance pay was denied to the black union employees because of racial bias and holding that this still failed to state a permissible claim under Title VII, did the Court of Appeals for the Eleventh Circuit effectively repeal Title VII as an available remedy for black employees covered by collective bargaining agreements except in the narrow class of cases where the collective bargaining agreement is itself discriminatory?

2. Does "federal labor policy" require that black employees "sacrifice any right to complain of more favorable treatment of non-union employees" when that treatment is the product of racial discrimination and is otherwise violative of Title VII of the Civil Rights Act of 1964?

PARTIES

The parties in the court below were as follows:

Plaintiffs-Appellants

1. Oliver Marshall
2. James Pullom
3. Oscar Bender
4. Leon Blevins
5. John Booker
6. Ocie Lee Coates
7. Robert Cockrell
8. Thomas Cole, Jr.
9. Eddie Cooper
10. Willie Craig
11. Emanuel Dunham
12. Ward Evans
13. L. J. Gilchrist
14. Leroy Gibson
15. J. C. Hrobowski
16. Eddie Jones
17. James Henry Jones
18. Johnnie Lee Jones
19. William Jones
20. Morris Mack, Sr.
21. Willie J. Mahan
22. Charles E. Rodgers
23. Robert Marshall
24. Sam Marshall
25. Fred McHenry, Jr.
26. Lullen Mitchell
27. William Page, Jr.
28. O. C. Page
29. Henry Soles
30. Joseph Spann
31. George Thomas
32. James Warren
33. Willie F. Wright
34. Sammie Hulett
35. Joe Hendricks
36. Julius Jordan
37. Columbus McMillan
38. Jessie Washington
39. Michael Howard
40. M. C. Pickett
41. Erving Gulley
42. James Jordan
43. Billy W. Chambers
44. Mrs. Josephine Bevelle as Representative and Administratrix of Nathaniel Bevelle

Defendants-Appellees

45. Western Grain Company, Inc., The Riverside Group, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

REASONS FOR GRANTING THE WRIT 6

I. The Balancing Of Title VII And The NLRA Destroys The Applicability Of Title VII For A Broad Sector Of The Labor Force And Is A Radical Departure From Existing Principles Regarding The Accommodation Of The Two Statutes. 8

II. The Decision Below Will Preclude Victims Of Racial Discrimination From Being Able To State A Claim Under Title VII In Many Situations. 14

III. The Decision Below Permits Severance Pay Policies To Perpetuate Historical Patterns Of Racial Segregation By Precluding Pursuit Of Title VII Remedies Against The Disparate Impact Of Such Policies In Count Two Of The Complaint. 18

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Cases: *Pages*

Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48, 94 S.Ct. 1011, 1019-1020, 39 L.Ed.2d 147 (1974) 8, 10

Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 107 S.Ct. 1410, 1415, 1417 n.15 (1987) 10, 16

Baldracchi v. Pratt & Whitney Aircraft Division, 814 F.2d 102, 105 (2nd Cir. 1987), *cert. denied*, ... S.Ct. ....., 1988 WL 62268 (U.S. June 13, 1988) (No. 87-218) 11

Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 734-746, 101 S.Ct. 1437, 1441-1447, 67 L.Ed.2d 641 (1981) 9

Bell v. Birmingham Linen Service, 715 F.2d 1552, 1557 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204, 104 S.Ct. 2385, 81 L.Ed. 344 (1984) 17

California Brewers Assn. v. Bryant, 444 U.S. 598, 607-610, 100 S.Ct. 814, 820-21, 63 L.Ed.2d 55 (1980) 11, 12

Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1131 (11th Cir. 1984) 17

Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982) 19

Consolidated Coal Company v. Marshall, 663 F.2d 1211, 1219 (3rd Cir. 1982) 11

Conley v. Gibson, 355 U.S. 41, 47-48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957) 16

Cooper v. General Dynamics, 533 F.2d 163, 169 (5th Cir. 1976), *cert. denied*, 433 U.S. 908, 97 S.Ct. 2972, 53 L.Ed.2d 1091 (1977) 10

Corley v. Jackson Police Department, 566 F.2d 994, 999 (5th Cir. 1978) 17

Craig v. Alabama State University, 804 F.2d 682, 689 (11th Cir. 1986) 19

Davis v. Califano, 613 F.2d 957, 962-963 (D.C. Cir. 1979) 17

TABLE OF AUTHORITIES – (Continued)

Cases: *Pages*

Doe on Behalf of Doe v. St. Joseph Hospital, 788 F.2d 411, 426 (7th Cir. 1986) 11

Gibson v. Local 40, Supercargos & Checkers, etc., 543 F.2d 1259, 1266 n.14 (9th Cir. 1976) 11

Griggs v. Duke Power Co., 401 U.S. 424, 432-33, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971) 19

Harris v. Birmingham Board of Education, 712 F.2d 1377, 1383 (11th Cir. 1983) 17

Hodgson v. First Federal Savings and Loan Ass'n., 455 F.2d 818, 821-22 (5th Cir. 1972) 17

International Association of Machinists v. United Technologies Corporations, 704 F.2d 569, 572 (11th Cir. 1983) 13

Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992, 1015 (11th Cir. 1982) 12

James v. Stockham Valves, 559 F.2d 310, 351-352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978) 12

Lee v. Russell County Board of Education, 684 F.2d 769, 774 (11th Cir. 1982) 17

Leone v. Mobile Oil Corporation, 523 F.2d 1153, 1158 (D.C. Cir. 1975) 11

Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970) 19

Lyght v. Ford Motor Co., 643 F.2d 435, 438 (6th Cir. 1981) 11

Mann v. Adams Realty Co., Inc., 556 F.2d 288, 293 (11th Cir. 1977) 16

Marine Coatings of Alabama v. United States, 792 F.2d 1565, 1569 (11th Cir. 1986) 13

Marshall v. N. L. Industries, Inc., 618 F.2d 1220, 1222 (7th Cir. 1980) 11

TABLE OF AUTHORITIES – (Continued)

Cases: *Pages*

Marshall v. Western Grain, Inc., 838 F.2d 1165, 1169-1172, *rehearing denied*, 844 F.2d 794 (11th Cir. 1988) 1

McDotnald v. City of West Branch, Michigan, 466 U.S. 284, 104 S.Ct. 1799, 1802, 80 L.Ed.2d 302 (1984) 10

McDonnell Douglas v. Green, 411 U.S. 792, 805, 93 S.Ct. 1817, 1826, 36 L.Ed.2d 668 (1973) 17

McLendon v. Continental Grays, Inc., 602 F. Supp. 1492, 1501-1502 (D. N.J. 1985) 11

Nix v. WLCY Radio/Rayhall Communications, 738 F.2d 1181, 1185, *rehearing denied*, 747 F.2d 710 (11th Cir. 1984) 17

Nottelson v. Smith Steel Workers, 643 F.2d 445, 452 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046, 102 S.Ct. 587, 70 L.Ed.2d 488 (1981) 10

Peabody Gallon v. Dollar, 666 F.2d 1309, 1320-22 (10th Cir. 1981) 11

Robbins v. Prosser's Moving and Storage Co., 700 F.2d 433 (8th Cir.), *affirmed*, 466 U.S. 364, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984) 11

Robinson v. Lorillard Corp., 444 F.2d 791, 799 (5th Cir. 1971), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 651, 30 L.Ed.2d 655 (1972) 10

Steck v. Smith Barney, 661 F. Supp. 543, 545-46 (D. N.J. 1987) 11

Teamsters v. United States, 431 U.S. 324, 352, 97 S.Ct. 1843, 1856, 1863, 52 L.Ed.2d 396 (1977) 11, 17

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981) 16, 17

United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 857 (5th Cir. 1975) 11

TABLE OF AUTHORITIES – (Continued)

Cases: *Page*

United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972) 19

Walker v. Jefferson County Home, 726 F.2d 1554, 1558 (11th Cir. 1984) 19

Watson v. Fort Worth Bank and Trust, 56 U.S.L.W. 4922, 4925, (U.S. June 29, 1988) (No. 86-6139) 19

Wilmington v. J. I. Case Co., 793 F.2d 909 (8th Cir. 1986) 11

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000-e *et seq.* ..... *passim*

Section 703 (h) of Title VII 11, 12

29 U.S.C. Section 158 (a) (3) 2, 3, 11

29 U.S.C. Section 158 (a) (5) 3, 14

42 U.S.C. Section 2000e-2 (h) 11, 12

Federal Rule of Civil Procedure 12 13

Federal Rule of Civil Procedure 12 (b) (6) 7, 15, 16

Federal Rule of Civil Procedure Rule 56 13

National Labor Relations Act 8, 11, 14

No. 88-

IN THE

Supreme Court Of The United States

October Term, 1988

OLIVER MARSHALL, et al.,
Petitioners,

v.

WESTERN GRAIN COMPANY, INC.,
AND THE RIVERSIDE GROUP, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit at issue is reported in *Marshall v. Western Grain, Inc.*, 838 F.2d 1165 (11th Cir. 1988). That opinion is reproduced in the Appendix at pages A-1-13. The order denying petitioner's petition for rehearing *en banc* is reproduced in the Appendix at page A-16.

JURISDICTION

The judgment sought to be reviewed was dated and entered on March 1, 1988. (App. A-14) Petitioner's timely petition

for rehearing *en banc* was denied without opinion on April 6, 1988. (App. A-16) The time for filing this Petition for a Writ of Certiorari was extended by 14 days by leave of this court granted July 5, 1988. This Petition for Certiorari is being filed within the time allowed by the Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

STATUTES

42 U.S.C. § 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, ***

29 U.S.C. § 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer –

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: ***

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT OF THE CASE

The plaintiff's Complaint of racial discrimination was dismissed *on the pleadings* on the grounds that it failed to state a cause of action. Complaint, Par. 14 and 15. The Complaint alleged that "because of the plaintiff's race and color" the defendant paid severance pay to the non-union employees, who were white, and refused to pay severance pay to the union employees, who were black. Complaint, Par. 14 and 20-23. The Court of Appeals for the Eleventh Circuit has determined that this allegation when taken as true *does not state a cause of action* under Title VII of the Civil Rights Act of 1964, marking the first time in the history of that Act that an employment decision made "because of the plaintiffs' race and color" has been held not to state a cause of action.

The Court of Appeals based its ruling on two grounds. First, it was held that there are no set of facts which could ever establish that disparate treatment of white non-union employees and black union employees was motivated by racial discrimination and, hence, no cause of action could ever exist for such racial discrimination as a matter of law, regardless of the strength of *direct admissions* of intentional racial motivation or circumstantial evidence of such motivation. (App. 6-13). The Court below recognized that "[t]he plaintiffs in the present case seek the opportunity to demonstrate that the defendants were motivated by race or color in making payment of severance benefits, not by the contractual status of the various employees". (App. 10). The Court held that no such opportunity can *ever* be permitted because, in the words of the Eleventh Circuit, "such a challenge does not state a claim of Title VII discrimination". (App. 12).

Secondly, the 11th Circuit held that it should not recognize a cause of action for *racially* disparate treatment of white non-union employees and black union employees because of "the federal policy of judicial nonintervention in the collective bargaining process". (App. 10). Nevertheless, the Eleventh Circuit ruled that the right to be free from racial discrimination under Title VII should be *preempted* by the collective bargaining process except in the limited situation where the collective bargaining agreement is itself discriminatory. (App. 10-12, 6). The Court reasoned that this preemption does not leave plaintiffs without a remedy because "[i]f minority union members are dissatisfied with the terms of their collective bargaining agreement they have the option of electing a new bargaining representative or leaving the union altogether". (App. 11).

STATEMENT OF FACTS

The defendants operated a plant in Birmingham, Alabama in which the black employees were segregated into the jobs covered by a collective bargaining agreement with the United Steelworkers of America and the white employees were segregated into the better paying and more desirable jobs that were not covered by that agreement, which included a number of jobs that are traditionally covered by collective bargaining such as mechanics, millwrights, and maintenance employees.[1] (App. 2); Complaint, Par. 20, p. 5. Only one white employee was in the historically black jobs covered by the union contract. Complaint, Par. 9. Only four black employees were in the non-union jobs. *Id.* at Par. 10. These four black employees were able to gain their jobs only by way of "pressure and threats of

[1]The Eleventh Circuit recognized that the non-union group of employees "included . . . millwrights, maintenance and truck mechanics employed in the maintenance department . . . watchmen", but then seemed to suggest that this was perfectly natural under the NLRA. (App. 2). It is not natural. It is highly suspect that the white millwrights, mechanics, etc. are not a part of the union or bargaining unit. Such blue collar jobs are usually a part of any bargaining unit which does not have its genesis in racial discrimination.

suit" against the Company. Complaint, Par. 20. The named plaintiffs are 42 of the defendant's black employees and they represent themselves and a class of all black employees of the defendants.

Between December 23, 1983 and February 15, 1984 the defendant, Western Grain, laid off all of its employees and closed the plant. Complaint, Par. 8. In September, 1984 the plaintiffs learned that severance pay was paid to non-union employees, who were virtually all white, but severance pay was not paid to the union employees, who were all black except one. Complaint, Par. 8.

The decision not to pay severance pay to the Union employees was made "because of the plaintiffs' race and color". Complaint, Par. 14. As a result of such racial discrimination, each of the plaintiffs were deprived of severance pay "in the amount of one week's pay for each year that each of the plaintiffs worked at the Western Grain plant". Complaint, Par. 17. The white non-union employees were provided with such severance benefits, but the black union employees were not. Complaint, Pars. 11-14. Such white employees were also provided all of the benefits that black union employees were provided. Complaint, Par. 21.

The segregation of whites into the non-union jobs and blacks into the union jobs was the product of a "policy and practice of discrimination against blacks on account of their race which had been implemented by the Jim Dandy Company" and which had been continued by the defendants "by perpetuating a policy in which non-union positions were generally not open to black workers. Complaint, Par. 23 and 20 and App. 3. The decision to pay severance benefits to the white non-union employees "perpetuated" the historical pattern of racial segregation of blacks in the union jobs and whites in the non-union jobs, and, and, thus, violated Title VII. Complaint, Par. 20, 23, 24, 25.

The plaintiffs in this case do not challenge any part of the collective agreement, but instead challenge a decision made *outside* that agreement regarding severance benefits denied to

black employees during a plant closing because of their race and color". Complaint, Par. 14 and 15. The collective bargaining agreement does not speak to severance benefits in a plant closing situation.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has held that "[w]hen minority union members choose collective bargaining as a means of remedying unfavorable employment conditions, they sacrifice any right to complain of more favorable treatment of non-union employees". (App. 11). The Court below held that black employees "sacrifice" such rights even where they "seek the opportunity to demonstrate that the defendants *were motivated by race or color* in making payment of severance benefits, not by the contractual status of the various employees". (App. 10). Recognizing that dismissal on the pleadings under Rule 12b(6) is improper " 'unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle him to relief' ", the Eleventh Circuit held that black employees: (1) *could never* prove that more favorable treatment of white non-union employees was motivated by race under *any conceivable set of facts*; and (2) *should never* be allowed the opportunity to prove such racial motivation because of the "federal policy of judicial nonintervention in the collective bargaining process". (App. 6-8). The court below refused to recognize any exception for this sweeping rule of law except for the narrow situation where the collective bargaining agreement is discriminatory on its face or as applied. (App. 6-8). The Eleventh Circuit held that "[w]here the collective bargaining agreement is neither discriminatory on its face nor in its application, the policies of Title VII give way to federal labor policies". (App. 6). This narrow exception, however, is of no help in a situation such as that in the present case where a racially motivated decision is made on a subject *not addressed* in the collective bargaining agreement. Plaintiffs in such a situation cannot challenge the collective bargaining agreement on its face or as

applied but, under the decision of the Eleventh Circuit, are still precluded from attacking the decision even though it is the product of intentional racial discrimination. The court below held that this does not leave black union employees totally without a remedy for racial discrimination because "if minority union members are dissatisfied with the term of their collective bargaining agreement they have the option of electing a new bargaining representative or leaving the union altogether". (App. 11). In a plant closing situation, of course, even these hobbled "remedies" are not available to victims of racial bias.

The Eleventh Circuit has erred in a manner that is of fundamental importance to the future of the Civil Rights Act as a remedy for racial discrimination. The Circuit has effectively repealed the statute for all black employees who choose to belong to a union because, in the words of the decision below, "they sacrifice any right to complain of more favorable treatment of non-union employees" even where such treatment was "motivated by race or color . . ., not by contractual status of the various employees". (App. 10-11). The Eleventh Circuit is wrong to have done so because: (1) at the pleading stage of the case the plaintiffs are not required to *prove* racial bias, but merely to give a "short plain statement" alleging its existence; (2) there are numerous sets of facts conceivable which would establish racial motivation in the more favorable treatment of the whites segregated into the non-union jobs, and this is all that is required to avoid dismissal under federal civil procedure Rule 12b (6); and (3) there is no "federal labor policy" which demands that black employees "sacrifice any right" to complain of racial discrimination merely because they are members of a racially segregated union and the decision below directly contradicts the decisions of this Court and the other Circuits in holding otherwise.

I. The Balancing Of Title VII And The NLRA Destroys The Applicability Of Title VII For A Broad Sector Of The Labor Force And Is A Radical Departure From Existing Principles Regarding The Accommodation Of The Two Statutes.

The decision below is a radical departure from established principles of law. In *Alexander v. Gardner-Denver,* 415 U.S. 36, 47-48, 94 S.Ct. 1011, 1019-1020, 39 L.Ed.2d 147 (1974), the Court held that "legislative enactments in this area have long evinced a general intent to accord *parallel or overlapping* remedies against discrimination" *and not to require* an employee to elect to pursue his remedies under the collective bargaining process or the NLRA only at the expense of relinquishing his rights under Title VII. *Id.* (emphasis supplied). This Court specifically held that an employee cannot be put to an "election of remedies" between the collective bargaining process and Title VII because "in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress" and "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence". *Id.* 415 U.S. at 49-50, 94 S.Ct. at 1011. The Court added that "certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums". The Court also held that "there can be no prospective waiver of an employee's rights under Title VII" through the collective bargaining process because "Title VII's strictures are absolute and represent a Congressional command that each employee be free from discriminatory practices" and, "[o]f necessity, the rights conferred [by Title VII] can form no part of the collective bargaining process since the waiver of these rights would defeat the paramount congressional purpose behind Title VII". *Alexander v. Gardner-Denver, supra,* 415 U.S. at 51, 94 S.Ct. at 1021.

The Eleventh Circuit, however, has clearly put the plaintiffs to virtually the same election-of-remedies which this Court condemned in *Alexander v. Gardner-Denver Co., supra.* Here, the

plaintiffs have been told they cannot pursue Title VII remedies because they can address the racial discrimination they allege to exist through the collective bargaining process or through "the option of electing a new bargaining representative or leaving the union altogether". (App. 11). The plaintiffs are also being held to have "sacrificed any right" to complain of racial discrimination except in the limited situation where the collective bargaining agreement is discriminatory on its face or as applied. That exception, however, is meaningless where, as here, the challenged decision could not be challenged as a part of the collective bargaining agreement because that agreement does not address the subject matter of plant closing severance benefits. Moreover, the plaintiffs are being restricted to an agreement negotiated in 1978 while the decision denying the black employees severance benefits was not made until five years later in 1983. This is nothing more than a prospective waiver of the worst kind. The lay plaintiffs are being told that when their union *failed to address* plant closing severance benefits in negotiating the collective bargaining agreement *in 1978,* that failure operated as a prospective waiver of the Title VII right to be free from a racially motivated decision to give such benefits to white non-union members *in 1983,* over five years later. Such a level of prescience of what might occur five years later is unheard of in the law or common sense.

In *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728, 734-746, 101 S.Ct. 1437, 1441-1447, 67 L.Ed.2d 641 (1981), the Court held that individual rights of employees under the FLSA or Title VII "are independent of the collective bargaining process" and are not to be "sacrificed" to such process. The Court held that while "courts ordinarily defer to collectively bargained-dispute resolution procedures when the parties dispute arises out of the collective bargaining process . . . [n]ot all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining", because "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive

guarantees to individual workers". *Id.* 450 U.S. at 736-737. Among those are the individual rights accorded by Title VII and the FLSA. *Id.* The Court reiterated that "in enacting Title VII, Congress had granted individual employees a non-waivable, public law right to equal employment opportunities that was separate and distinct from the rights created through the 'majoritarian processes' of collective bargaining". *Id.* at 737-738. "[B]ecause Congress had granted aggrieved employees access to the courts, and because contractual grievance and arbitration procedures provided an inadequate forum for enforcement of Title VII rights, Title VII claims should be resolved by the courts *de novo*". *Id.* 450 U.S. at 737-38. The Court specifically rejected an effort to distinguish situations that involve a dispute over compensation even though such disputes are "subjects at the heart of the collective bargaining process". *Id.* 450 U.S. at 738-745. While the Court recognized the overlap between the contractual processes of collective bargaining and the statutory rights of Title VII and the FLSA, " 'the distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same occurrence [a]nd certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums' ". *Id.* 450 U.S. at 745-76 (quoting from Title VII context of *Alexander v. Gardner-Denver, supra,* 415 U.S. at 49-50). Accord, *Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 107 S.Ct. 1410, 1415 (1987); *McDonald v. City of West Branch, Michigan,* 466 U.S. 284, 104 S.Ct. 1799, 1802, 80 L.Ed. 2d 302 (1984). See generally, *Nottelson v. Smith Steel Workers,* 643 F.2d 445, 452 (7th Cir. 1981), *cert. denied,* 454 U.S. 1046 (1981) ("It is well settled . . . that Title VII rights cannot be bargained away and that a collective bargaining agreement therefore does not of itself provide a defense for Title VII violations".); *Robinson v. Lorillard Corp.,* 444 F.2d 791, 799 (5th Cir. 1971) ("The rights assured by Title VII are not rights which can be bargained away — either by a union, by an employer, or by both acting in concert".); *Cooper v. General Dynamics,* 533 F.2d 163, 169 (5th Cir. 1976), *cert. denied,* 433

U.S. 308 (1977) (29 U.S.C. 158 (a) (3) does not have priority over Title VII); *Steck v. Smith Barney*, 661 F. Supp. 543, 545-46 (D. N.J. 1987); *McLendon v. Continental Grays, Inc.*, 602 F. Supp. 1492, 1501-1502 (D. N.J. 1985).

The decision below has created a conflict among the Circuits. All of the Circuits reaching the issue, except for the Eleventh have held that the collective bargaining process or contractual remedies do not override Title VII or similar statutes and that plaintiffs may challenge decisions that are racially discriminatory regardless of whether the collective bargaining agreement is discriminatory on its face or as applied. The Eleventh Circuit is the only Circuit which has held that a black employees who join unions can only challenge racial discrimination when the collective bargaining agreement is discriminatory on its face or as applied.[2]

Moreover, the Eleventh Circuit's effort to strike "a balance between the competing policies of Title VII and NLRA" is judicial legislating at its worst. Congress has already struck that balance in Section 703 (h) of Title VII. This provision was placed in Title VII as a result of Congressional debates over the balancing of the interests of the collective bargaining process against the interests protected by Title VII. See, *Teamsters v. United States*, 431 U.S. 324, 352, 97 S.Ct. 1843, 1863, 52 L.Ed. 2d 396 (1977); *California Brewers Assn. v. Bryant*, 444 U.S.

---

[2]*Leone v. Mobile Oil Corporation*, 523 F.2d 1153, 1158 (D.C. Cir. 1975); *Baldracchi v. Pratt & Whitney Aircraft Division*, 814 F.2d 102, 105 (2nd Cir. 1987), *cert. denied*, _____ S.Ct. _____, 1988 WL 62268 (U.S. June 13, 1988) (No. 87-818); *Consolidated Coal Company v. Marshall*, 663 F.2d 1211, 1219 (3rd Cir. 1982); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 857 (5th Cir. 1975); *Lyght v. Ford Motor Co.*, 643 F.2d 435, 438 (6th Cir. 1981); *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411, 426 (7th Cir. 1986); *Marshall v. N.L. Industries, Inc.*, 618 F.2d 1220, 1222 (7th Cir. 1980); *Wilmington v. J.I. Case Co.*, 793 F.2d 909 (8th Cir. 1986); *Robbins v. Prosser's Moving and Storage Co.*, 700 F.2d 433 (8th Cir.), *affirmed*, 466 U.S. 364, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984); *Gibson v. Local 40, Supercargos & Checkers, etc.*, 543 F.2d 1259, 1266 n.14 (9th Cir. 1976); *Peabody Gallon v. Dollar*, 666 F.2d 1309, 1320-22 (10th Cir. 1981).

598, 607-610, 100 S.Ct. 814, 820-821, 63 L.Ed.2d 55 (1980). The provisions of Section 703 (h) of Title VII state:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

The plain terms of Section 703 (h) indicate a *Congressional* balance between the collective bargaining process and Title VII which is decidedly narrower than the sweeping one enacted by the Eleventh Circuit in this case. Congress in Section 703 (h) permits compensation decisions which are discriminatory to be balanced by the collective bargaining process *only* where: (1) it is the result of a "bona fide seniority system"; and (2) it is "not the result of an intent to discriminate because of race or color". 42 U.S.C. Section 2000e-2 (h). Congress gave the results of collective bargaining no precedence over Title VII except in the narrowly circumscribed area involving "bona fide seniority systems". *California Brewers Assn. v. Bryant, supra,* 444 U.S. at 608-609, 100 S.Ct. at 820. Non-seniority provisions of collective bargaining agreements are given no priority over Title VII and seniority provisions are given priority only when the standards of proof for establishing *bona fides* are satisfied and *there is no intent to discriminate. Id.,* 444 U.S. at 608-609; *James v. Stockham Valves,* 559 F.2d 310, 351-353 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978) (four part test for establishing *bona fides*); *Jackson v. Seaboard Coast Line R. Co.,* 678 F.2d 992, 1013, 1015 (11th Cir. 1982). The "balancing" by the panel here does not contain such limits.

The Complaint in the current case clearly satisfies the requirements of Section 703 (a) of Title VII. The Complaint alleges that the decision to deny the plaintiffs severance benefits was made "because of their race and color". Complaint, Par.

14 and 15. Moreover, there is nothing in the pleadings which states that such decision was dictated by a "bona fide seniority system". Indeed, the collective bargaining agreement does not even address the subject to severance benefits in a plant closing and there is nothing "bona fide" about a collective bargaining agreement which has its genesis in the segregation of white employees into the better paying, more desirable non-union jobs and black employees into the inferior union jobs.

Lastly, the Court of Appeals relied upon facts which are not in the complaint, and some of which are not even in the record.[3] First, the court below looked to a collective bargaining agreement attached to the defendant's motion to dismiss which showed on its face that it expired October 9, 1981, nearly three years *before* the decision on severance pay was made which is challenged in this lawsuit as racially discriminatory. R. 1-6. The motion to dismiss also attached a *proposed* extension of the collective bargaining agreement to April 9, 1984, but that extension was *unsigned* by the union and there was no evidence that the original agreement which expired in 1981 was in effect in 1984 when the contested decision to pay severance pay to the whites was made.

Secondly, even if the collective bargaining agreement was in existence when the severance pay decision was made, there is *nothing* in such agreement which "restricted" the defendant's ability to offer equal severance pay benefits to the union em-

[3]By looking to matters outside the pleadings, the Court of Appeals and the district court violated Rule 12 and the law of this Circuit. Rule 12 provides that "[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56". *Marine Coatings of Alabama v. United States*, 792 F.2d 1565, 1569 (11th Cir. 1986); *International Association of Machinists v. United Technologies Corporations*, 704 F.2d 569, 572 (11th Cir. 1983) ("Court powerless to enter a judgment on the motion to dismiss when materials outside the pleadings are considered without the notice required under summary judgment rule".).

ployees upon a plant closing. The Court below simply assumed there is, but a reading of the agreement reveals that it is silent on the entire issue of severance pay upon a plant closing.[4]

Thirdly, the panel erred in its holding "that 29 U.S.C. Section 158 (a) (5) required the employer to deny severance benefits to the plaintiffs pursuant to the terms of the collective bargaining agreement". (App. 13, 5). The NLRA does not dictate racial discrimination or serve as an excuse for it! There is nothing in 29 U.S.C. Section 158 (a) (5) which prohibits the employer from making *an offer* through the union of equal severance benefits to the black union employees, as opposed to *unilaterally imposing* such benefits on them. No offer was ever attempted here. It was the refusal to even make an offer to the black employees which is challenged as racially motivated. Indeed, not only does 29 U.S.C. Section 158 not prohibit the employer from making an offer of equal severance benefits, but in subsection (d) it provides a detailed mechanism for such offers and outlaws a refusal to bargain in subsection (a) (5).

II. The Decision Below Will Preclude Victims Of Racial Discrimination From Being Able To State A Claim Under Title VII In Many Situations.

The Eleventh Circuit has held that there are *no set of facts*

---

[4]There is a provision allowing severance pay when outside contractors are used to replace a department, but there is nothing which restricts management's right to pay severance pay to that situation or which prohibits payment of severance pay on a plant closing. Indeed, the "Management Rights" Article states that "[e]xcept as expressly and specifically limited or restricted by a provision of this Agreement, the Company has and shall retain the full right of management and direction of the plant and its operations . . . [which] include among other things, but are not limited to, the right to plan, direct, control, increase, decrease or *discontinue* operations in whole or in part; . . . to move, sell, close, liquidate or consolidate the plant in whole or in part". Thus, the Eleventh Circuit was wrong in assuming that "where the employer's provision of benefits to minority workers is restricted by the terms of a collective bargaining agreement, a balance between the competing policies of Title VII and NLRA must be struck". (App. 5). There is no such "restriction" in the collective bargaining agreement.

which can be conceived which would support a claim of racial discrimination between white non-union employees and black union employees because "bargaining unit employees are *never* similarly situated with non-bargaining unit employees" *as a matter of law*. (App. 9). (Emphasis in original). This is a shocking departure from *all* standards of Title VII law. Unless reviewed by this Court, black union employees can *never* state a claim for race discrimination in the better treatment of white non-union employees *regardless of the facts* proving such race discrimination.

Thus, if the defendant had issued a formal policy which stated that the union employees were not receiving severance pay *because they are black* and the non-union employees were receiving such benefits *because they are white,* the Eleventh Circuit opinion would dictate the dismissal of such a claim because "bargaining unit employees are *never* similarly situated with non-bargaining unit employees". (App. 9). (emphasis in original). Similarly, if the plaintiffs prove conclusively that the union vs. non-union distinction was a ruse or a pretext for the differential treatment of the black union employees as compared to the white non-union employees, and that the true reason was intentional race discrimination, the Court below would again dictate dismissal for failure to state a claim upon which relief can be granted under Rule 12 (b) (6). (App. 8-12).

The Eleventh Circuit has fundamentally erred in a way that can seriously undercut the enforcement of the employment discrimination laws of this nation. Employers who have historically segregated their workforces by placing whites in the non-union jobs and blacks in the union jobs will be free to intentionally treat the white employees better than the black employees *because of their race,* but there will be nothing that the black employees can do about it outside the collective bargaining process because they will be *precluded* from stating a claim under Title VII for such discrimination *in all fact situations*. The err which causes this result takes several forms.

First, the court below takes as true the allegation that severance pay was denied to the black union members "because of

their race and color" as alleged in the complaint, but then contradicts itself by holding that the plaintiffs failed to prove a prima facie case of discrimination. Compare App. 7 with App. 8, 4. The plaintiffs are not required to *prove* a prima facie case in order to avoid dismissal on the pleadings under Rule 12 (b) (6) ; *Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 107 S.Ct. 1410, 1417 n.15 (1987) ("Under the Federal Rules of Civil Procedure, respondent had no duty to set out all of the relevant facts in his complaint".) ; *Conley v. Gibson,* 355 U.S. 41, 47-48, 78 S.Ct. 99, 103 (1957) ; *Mann v. Adams Realty Co., Inc.,* 556 F.2d 288, 293 (11th Cir. 1977) .

Second, the court below sets up an irrebuttable presumption that differences in treatment between white non-union employees and black union employees can *never* be motivated by race, regardless of the evidence proving such motivation.[5] The Eleventh Circuit states:

> The plaintiffs in the present case seek the opportunity to demonstrate that the defendants were motivated by race or color in making payment of severance benefits, not by the contractual status of the various employees. However, the plaintiffs *cannot* negate the existence of the collective bargaining agreement. (App. 10) . (emphasis supplied) .

This is the first time in the history of Title VII that a plaintiff has been precluded *as a matter of law* from proving that the stated reason for racially differential treatment is not the true reason, but is a mere pretext for intentional racial discrimination. This Court has always held that a plaintiff *must be given* the opportunity to establish that the articulated rea-

[5]The Eleventh Circuit has established such irrebuttable presumption without any evidence from the employer that it made the decision because of union status and not race. This Court has held that in Title VII cases an employer's articulated reason for its different treatment of whites and blacks *must* be "through the introduction of admissible evidence" and *cannot* be "merely through an answer to the complaint or by argument of counsel". *Texas Department of Community Affairs v. Burdine, supra,* 450 U.S. at 255 n.9, 101 S.Ct. at 1094 n.9. Here, the defendant offered no affidavit of its decisionmaker, but merely suggested *in argument by counsel* in a motion to dismiss that the decision was premised upon union status and not race.

son for the racially differential treatment is a *pretext* for intentional discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981); *McDonnell Douglas v. Green,* 411 U.S. 792, 805, 93 S.Ct. 1817, 1826, 36 L.Ed.2d 668 (1973).

The err of the panel partly flows from a radically different view of what constitutes a prima facie case of race discrimination than what has previously been the law. The panel holds that "[t]o establish a prima facie case of racial discrimination under Title VII, the plaintiffs must show they are members of a racial minority and that they were treated differently from similarly situated non-minority members". (App. 4). This is clearly wrong insofar as it suggests that this is the only, or the essential, means of proof of a prima facie case. A prima facie case can be proven through various means, including the following: (1) direct evidence or direct admissions of racial motivation in making the decision;[6] (2) circumstantial proof through the traditional four-part test of *McDonnell Douglas* and *Burdine*;[7] (3) proof of an "immediate past history of racial discrimination" which establishes a prima facie inference of discrimination;[8] and (4) statistical evidence which establishes an inference of discrimination.[9]

The panel, however, ignores these various means of *proof,* and restricts the plaintiffs strictly to the unadorned compara-

---

[6]*Bell v. Birmingham Linen Service,* 715 F.2d 1552, 1557 (11th Cir. 1983), *cert. denied,* 467 U.S. 1204 (1984); *Lee v. Russell County Board of Education,* 684 F.2d 769, 774 (11th Cir. 1982); cf. *Hodgson v. First Federal Savings and Loan Ass'n.,* 455 F.2d 818, 821-22 (5th Cir. 1972) (interview notes read "too old" in an age case).

[7]See e.g., *Nix v. WLCY Radio/Rayhall Communications,* 738 F.2d 1181, 1185 (11th Cir. 1984); *Corley v. Jackson Police Department,* 566 F.2d 994, 999 (5th Cir. 1978) (Err to stop at the reasons articulated by the employer and not consider evidence of pretext.).

[8]*Harris v. Birmingham Board of Education,* 712 F.2d 1377, 1383 (11th Cir. 1983).

[9]*Davis v. Califano,* 613 F.2d 957, 962-963 (D.C. Cir. 1979); *Teamsters v. United States,* 431 U.S. 324, 340, 97 S.Ct. 1843, 1856 (1977); *Carmichael v. Birmingham Saw Works,* 738 F.2d 1126, 1131 (11th Cir. 1984).

tive treatment of white non-union employees and black non-union employees as the *sole* means of establishing a prima facie case. The panel then proceeds to hold that plaintiffs cannot *prove* their claim through this means. Besides the error of requiring *proof* of discrimination, rather than merely an allegation of such discrimination at the pleading stage of the case, the panel erred in simply *assuming* that the plaintiffs will not prove their claim of racial animus through direct admissions of racial bias or conclusive proof that the union vs. non-union distinction is a pretext to cover-up a decision made in whole or in part "because of the plaintiffs' race or color". The plaintiffs *proof* of their claim is simply not a permissible issue at this stage of the pleadings.

III. The Decision Below Permits Severance Pay Policies To Perpetuate Historical Patterns Of Racial Segregation By Precluding Pursuit Of Title VII Remedies Against The Disparate Impact Of Such Policies In Count Two Of The Complaint.

The preclusion of pursuit of Title VII remedies was extended to Count Two of the Complaint when the court below held that plaintiffs were not permitted to challenge the payment of severance benefits as a part of the "perpetuation of past discrimination" theory of that Count because "such a challenge does not state a claim of Title VII discrimination". (App. 12). In paragraph 22 of Count Two it is alleged that "union members were not granted the same benefits that non-union employees received, such as . . . severance pay" and that this "perpetuated a policy that was discriminatory" because of the historical segregation of the races. Complaint, Par. 23, 20, 8-13. The *sole relief* requested in Count Two is the payment of severance pay to the blacks equal to that afforded the whites. Complaint, Par. 25.

Any criteria which is race neutral in theory, but which has disparate impact in operation, violates the Act unless justified by business necessity and used in a way that is not a pretext for

discrimination.[10] *Griggs v. Duke Power Company,* 401 U.S. 424, 430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971) ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices".); *Watson v. Fort Worth Bank and Trust,* 56 U.S.L.W. 4922, 4925 (U.S. June 29, 1988) (No. 86-6139).

The dispensing of severance benefits to non-union, but not union, employees is certainly race neutral on its face, but when the non-union employees are virtually all white and the union employees are virtually all black because of past racial segregation of the races or otherwise, the use of non-union status as the criteria for dispensing benefits perpetuates that past discrimination and otherwise has disparate impact in its operation because it results in the whites receiving the benefits and the blacks not receiving them. Intent is unimportant. *Griggs, infra,* 401 U.S. at 432-433. The effect is discriminatory and must be justified by business necessity. *Local 189, United Papermakers & Paperworkers v. United States,* 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied,* 379 U.S. 919 (1970). ("When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding, legitimate, non-racial business purpose".).

In addition, the decision below will not allow a claim to be stated under Title VII for racially disparate treatment or disparate impact unless the collective bargaining agreement is itself discriminatory. While this is error for the reasons stated elsewhere in this Petition, it is also factually incorrect to simply assume, as the panel does, that the collective bargaining agreement is not discriminatory on its face in defining the bargaining unit in such a way that it excludes the white employees' jobs, many of which are usually a part of the bargaining unit

[10] *Craig v. Alabama State University,* 804 F.2d 682, 689 (11th Cir. 1986); *Connecticut v. Teal,* 457 U.S. 440, 102 S.Ct. 2525 (1982); *Walker v. Jefferson County Home,* 726 F.2d 1554, 1558 (11th Cir. 1984); *United States v. Jacksonville Terminal Co.,* 451 F.2d 418, 451 (5th Cir. 1971).

such as millwrights, maintenance mechanics, truck drivers, etc. (App. 2). Complaint, Par. 20. The definition of the bargaining unit *in the collective bargaining agreement* racially segregates the workforce and causes decisions made on the basis of union status to perpetuate the historical segregation of the workforce in exactly the way condemned in the cases recited above. See, *Local 189, supra,* 416 F.2d at 989.

CONCLUSION

The opinion below, unless corrected, will suspend Title VII as a remedy for racially disparate treatment and disparate impact for many employees covered by a collective bargaining agreement. This is contrary to well established precedent and the Congressional intent and merits review by this Court.

Respectfully submitted,

Robert L. Wiggins, Jr.

Richard J. Ebbinghouse

Attorneys for Plaintiffs

OF COUNSEL:

Gordon, Silberman, Wiggins and Childs
1500 Colonial Bank Building
Birmingham, Alabama 35203
(205) 328-0640

CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing by United States mail, postage prepaid and properly addressed on Mr. David J. Middlebrooks, Attorney at Law, 2211 Arlington Avenue South, Birmingham, Alabama 35205.

This the _____ day of _____, 1988.

_____

Robert L. Wiggins, Jr.

APPENDIX

Oliver MARSHALL, et al.,
Plaintiffs-Appellants,

v.

WESTERN GRAIN COMPANY, INC.,
and The Riverside Group, Inc.,
Defendants-Appellees.

No. 86-7761.

United States Court of Appeals, Eleventh Circuit.

March 1, 1988.

Rehearing and Rehearing En Banc
Denied April 6, 1988.

Richard Ebbinghouse, Birmingham, Ala., for plaintiffs-appellants.

David J. Middlebrooks, Sirote, Permutt, McDermott, Slepian, Friend, Friedman, Held and Apolinsky, Birmingham, Ala., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before FAY, Circuit Judge, HENDERSON*, Senior Circuit Judge, and BLACK**, District Judge.

PER CURIAM:

The plaintiffs in this action, forty-six former union employees of Western Grain Company, Inc. [hereinafter "Western Grain"], appeal from an order entered by the United States District Court for the Northern District of Alabama dismissing their complaint for failure to state a claim upon which relief may be granted. For the following reasons, the judgment of the district court is affirmed in part, vacated in part, and reversed in part.

See Rule 34-2 (b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Susan H. Black, U.S. District Judge for the Middle District of Florida, sitting by designation.

Western Grain purchased its facility in Birmingham, Alabama from the Jim Dandy Company [hereinafter "Jim Dandy"]. After the sale, Western Grain continued to employ the plaintiffs, who had worked for Jim Dandy at the Birmingham plant. All of the plaintiffs were represented by Local 12830 of the United Steelworkers of America, AFL-CIO-CLC [hereinafter "Union"]. As part of the transaction, Western Grain assumed the collective bargaining agreement between Jim Dandy and the Union. That agreement remained in force through April 9, 1984.

In December 1983, Western Grain announced the shutdown of its operations. All but four union employees were terminated. Following clean-up operations, the remaining four union employees were also laid off. The Riverside Group, Inc. [hereinafter "Riverside"] alleged to be a successor corporation of Western Grain, bought out the company.

Western Grain paid severance pay to its employees who were not covered by the collective bargaining agreement. This group included office clerical employees, millwrights, maintenance and truck mechanics employed in the maintenance department, foremen, salesmen, watchmen, office janitors and professional employees, guards and supervisors as defined by the National Labor Relations Act, 29 U.S.C. § 141 et seq. [hereinafter "NLRA"]. They received one week's pay for each year of service performed at the Birmingham facility. Out of the total number of non-union employees, only four were black.

The union employees, on the other hand, did not receive any severance pay.[1] This group included production employees, truck drivers, laborers and plant janitors employed by the company. All but one of the sixty-eight union employees were black.

In October 1984, the plaintiffs filed charges with the Equal

[1]The collective bargaining agreement contained a provision for severance pay for union employees. However, its scope was limited to those bargaining unit employees who had worked for at least three years and only in the event that the hiring of outside contractors caused the elimination of an entire department.

Employment Opportunity Commission alleging race discrimination.[2] Following the receipt of right to sue letters, the plaintiffs filed a complaint against Western Grain and Riverside in the United States District Court for the Northern District of Alabama, Southern Division. In Count One, the plaintiffs alleged that the defendants violated § 703 (a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.,[3] by paying severance pay to non-union employees but not to union employees. In Count Two, the plaintiffs alleged that the defendants violated § 703 (a) of Title VII by perpetuating a policy in which non-union positions were generally not open to black workers. The plaintiffs claimed that this policy was discriminatory because non-union employees received benefits not available to union employees while at the same time receiving all the benefits given to union employees. In Count Three, the plaintiffs alleged that the defendants violated the Equal Pay Act of 1963, 29 U.S.C. § 206 (d),[4] when they made severance payments only to non-union employees.

---

[2]They claimed that they were not aware of the facts underlying their complaint until September 1984.

[3]Section 703 (a) provides as follows:

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[4]Section 206 (d) (1) provides as follows:

> (d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a

On June 6, 1986, both defendants filed motions to dismiss. On July 29, 1986, the district court granted the defendants' motions. The court granted Western Grain's motion on the basis of insufficiency of service of process. In his order, the trial judge stated that ordinarily he would grant leave to effect service within a specified time but he declined to do so because he believed that the plaintiffs failed to state a claim against either defendant under either Title VII or the Equal Pay Act. Following a denial of their motion to alter or amend the judgment, the plaintiffs filed this appeal.

I. Count One: Nonpayment of Severance Benefits

To establish a prima facie case of racial discrimination under Title VII, the plaintiffs must show that they are members of a racial minority and that they were treated differently from similarly situated non-minority members. *Morrison v. Booth*, 763 F.2d 1366, 1371 (11th Cir.1985). In employment discrimination cases, the question of whether the plaintiffs are similarly situated with non-minority members is crucial. *See, e.g., Johnson v. Artim Transportation System, Inc.*, 826 F.2d 538 (7th Cir.1987) (upholding district court finding that five white employees with different disciplinary records were not similarly situated with plaintiff); *Kendall v. Block*, 821 F.2d 1142 (5th Cir.1987) (upholding district court finding that white employees with different grade levels and performance ratings were not similarly situated with plaintiff).

The defendants focus on this "similarly situated" requirement in their defense of this appeal. According to the defendants, given the "differences in status created by the presence of the bargaining unit," the plaintiffs would under no circumstances be able to show that they were similarly situated with

---

system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

white, non-union workers with respect to payment of severance benefits. Brief of Defendants/Appellees at 13.[5]

The plaintiffs offer a different perspective in their briefs. According to the plaintiffs, the existence of a collective bargaining agreement is irrelevant to the question of whether the defendants' distribution of severance benefits was discriminatory. In support of this argument, the plaintiffs cite the decision in *Hishon v. King & Spalding*, 467 U.S. 69, 75, 104 S.Ct. 2229, 2233, 81 L.Ed.2d 59 (1984), where the Supreme Court ruled that "[a] benefit . . . may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *See* Reply Brief for Plaintiffs-Appellants at 2.

Although the *Hishon* decision offers some guidance regarding the employer's obligations under Title VII in distributing privileges of employment, it does not (as the plaintiffs suggest) necessarily preclude an employer from relying on its contractual rights and responsibilities in refusing to dispense privileges. Although an employer's obligations under Title VII preempt his contractual obligations, the courts do not lightly disregard the employer's contractual obligations. This is especially true in cases such as the present one, where the employer's contractual obligations are governed by the National Labor Relations Act [hereinafter "NLRA"]. Under the NLRA, the employer may not disregard the terms of a collective bargaining agreement in order to make severance benefits payments to his employees. 29 U.S.C. § 158(a)(5). Thus, where the employer's provision of benefits to minority workers is restricted by the terms of a collective bargaining agreement, a balance between the competing policies of Title VII and the NLRA must be struck.

Several broad principles may be discerned from the decisional law involving Title VII and the NLRA. One principle is that the NLRA offers no protection to an employer who de-

[5]Although the terms "union" and "collective bargaining unit" do not ordinarily have identical meanings, they will be used interchangeably in this opinion for the sake of convenience.

fends his practices on the basis of a collective bargaining agreement that is discriminatory on its face or in its application. When the collective bargaining agreement is discriminatory, the employer has an affirmative duty under Title VII to modify the agreement to remedy the effects of the discrimination. For example, in *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, AFL-CIO, 643 F.2d 445 (7th Cir.1981), *cert. denied*, 454 U.S. 1046, 102 S.Ct. 587, 70 L.Ed.2d 488 (1981), the plaintiff, a Seventh Day Adventist, alleged that his employer discharged him in violation of Title VII after he refused to financially contribute to his union. The court agreed, holding that although the collective bargaining agreement provided for such financial contributions, the employer nonetheless unreasonably failed to accommodate the plaintiff's religious beliefs by permitting substitute charity donations. In response to the employer's argument that it should be entitled to rely on the provisions of its union shop agreement, the court stated that "[i]t is well settled . . . that Title VII rights cannot be bargained away and that a collective bargaining agreement therefore does not of itself provide a defense for Title VII violations." *Id.* at 452. *See also United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir.1971), *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972), (Title VII overrides collective bargaining agreement where agreement restricts transfer and promotion opportunities of incumbent black employees).

Where the collective bargaining agreement is neither discriminatory on its face nor in its application, the policies of Title VII give way to federal labor policies. As a matter of federal labor law, courts will not intervene in the collective bargaining process and require the employer to take steps unauthorized by the duly-negotiated agreement. *See* 29 U.S.C. § 158(a)(5). This principle applies even in cases where the concerns of Title VII are indirectly implicated. *See generally Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975) (employer has no duty to bargain with minority union members regarding allegedly discriminatory transfer policies).

This refusal to tamper with nondiscriminatory collective bargaining agreements is necessary to promote respect for the collective bargaining process. Thus, courts have declined to intervene even in cases where the plaintiff frames his request for relief in the form of a Title VII complaint. For example, in *Rose v. Bridgeport Brass Co.*, 487 F.2d 804 (7th Cir.1973), the plaintiff claimed that her employer's decision to deny her a job reassignment after plant-wide layoffs, and to instead give jobs to male employees with less seniority, violated Title VII. The Seventh Circuit held that the plaintiff was not entitled to relief under Title VII because she was not contractually entitled to a job reassignment. According to the court,

> The Company would have violated the collective bargaining agreement and had it given Rose a job on October 30, and it would have done so at the expense of another employee. If what the Company did was required by the contract, and the contract itself was nondiscriminatory, the Company could not have discriminated against Rose no matter what its subjective motivation.

Id. at 810.[6]

In light of the principles set forth above, it is apparent that the collective bargaining agreement in this case should not be set aside based upon the mere allegation that minority workers were treated differently from non-minority workers. Instead, we must determine whether the "discrimination" alleged in Count One of the Complaint is the kind which requires judicial intervention into the collective bargaining process.

At this stage of the litigation, we must accept the plaintiffs' factual allegations as true and are not concerned with whether

---

[6]In determining that the plaintiff was not contractually entitled to a reassigned job after the layoff, the court in *Rose* deferred to the ruling of an arbitrator. A subsequent decision of the United States Supreme Court, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), effectively invalidated this portion of the court's analysis, holding that a Title VII plaintiff who raises issues previously decided by an arbitrator is entitled to a trial de novo regarding those issues. *Alexander* did not, however, disturb the principle set forth in *Rose* which requires judicial nonintervention into nondiscriminatory collective bargaining agreements.

the plaintiffs will be able to prove them at trial. "In appraising the sufficiency of the complaint . . ., the accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). As stated earlier, Count One alleges that the defendants, after deciding to close their Birmingham facility in 1983, began laying off predominately-black bargaining unit employees and predominately-white non-bargaining unit employees. After the layoffs, the defendants paid severance benefits to each member of the group of non-bargaining unit employees, and withheld such benefits from each member of the bargaining unit.[7] According to the plaintiffs, the defendants' withholding of severance pay from them constituted discrimination based on race and color in violation of Title VII.

What is immediately clear from the face of the Complaint is that the plaintiffs do not seek to prove that the collective bargaining agreement governing their relationship with the defendants was in itself discriminatory. In fact, the one crucial fact which the plaintiffs offer to establish their claim of dissimilar treatment — payment of severance benefits to predominately-white, non-union members and nonpayment to predominately-black union members — does not challenge the defendants' implementation of the collective bargaining agreement. Thus, the plaintiffs ask this court to recognize a theory of relief heretofore unrecognized in Title VII jurisprudence. As discussed above, federal courts have traditionally provided a remedy to collective bargaining unit members under Title VII when the plaintiffs claim that their employer discriminatorily applied the

---

[7]The Complaint does not allege that the defendants denied the plaintiffs severance benefits in violation of the collective bargaining agreement. In fact, as noted in footnote 1 above, the collective bargaining agreement provided that severance benefits would be paid to bargaining unit members under certain defined conditions, none of which apparently applied to the plaintiffs.

collective bargaining agreement, or that the agreement was discriminatory on its face. Under the theory set forth by the plaintiffs, the courts are asked to provide a remedy based upon the contention that non-minority, non-union employees were being treated differently from minority, union employees.[8]

For several reasons, we conclude that Count One does not state a claim of "discrimination" under Title VII. First and foremost, because of their unique status in the workplace, bargaining unit employees are *never* similarly situated with non-bargaining unit employees.[9] The unique treatment that employers give to bargaining unit members is, of course, reflected best by the collective bargaining agreement. This agreement represents a culmination of often-extensive "give-and-take" negotiations between the employer and the employees' designated bargaining representative. An employer's decision to pay severance or any other benefits cannot be understood without inquiring into the substance of such negotiations. In many cases, the inclusion of certain provisions into the collective bargaining agreement additionally requires inquiry into the negotia-

---

[8]The plaintiffs cite several cases as precedent for their theory of recovery. None, however, involve claims of discrimination based on dissimilar treatment of bargaining unit and non-bargaining unit employees. *Danner v. Phillips Petroleum Co.*, 447 F.2d 159 (5th Cir.1971), cited by the plaintiffs, provides little assistance. In *Danner*, the employer defended its decision not to give seniority and bidding rights to clerical employees on the grounds that clerical jobs were not "unionized" jobs. According to the employer, other employees such as utility men were considered "unionized" (although they were not actually union members) and therefore were entitled to these privileges. The Fifth Circuit rejected this defense as pretextual and, citing the dissimilar treatment of female clerical workers and male "unionized" employees, held in favor of the plaintiff. The court did *not* compare the employer's relative treatment of union and non-union employees.

[9]Although the parties are unable to cite any cases for or against this exact proposition, the court in its own research has located two analogous cases which indicate that union and non-union employees are not similarly situated for purposes of class membership under Fed.R.Civ.P. 23. *See Wells v. Ramsay, Scarlett & Company, Inc.*, 506 F.2d 436 (5th Cir.1975); *Cooper v. Florida Power & Light Co.*, 18 FEP Cases 319, 321 (M.D.Fla. 1978).

tions between other employers and other collective bargaining units in the industry.

Aside from the collective bargaining agreement itself, a number of other elements of the collective bargaining process reflect the unique treatment accorded to union members. The ability of an employer to modify the collective bargaining agreement, for example, is greatly restricted whenever the proposed modification involves "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). Under the NLRA, 29 U.S.C. § 158(a)(5), an employer has the duty to bargain over such "mandatory" subjects. *Clear Pine Mouldings, Inc. v. N.L.R.B.*, 632 F.2d 721 (9th Cir.), *cert. denied*, 451 U.S. 984, 101 S.Ct. 2317, 68 L.Ed.2d 841 (1981). Thus, while a sudden upturn in profits may stimulate an employer to spontaneously offer bonuses to his employees performing under individual contracts, that employer would be obligated to bargain with a designated bargaining representative over any bonus payments to union employees. The size and strength of the designated bargaining representative may further limit the conduct, or potential conduct, of the employer.

The plaintiffs in the present case seek the opportunity to demonstrate that the defendants were motivated by race or color in making payment of severance benefits, not by the contractual status of the various employees. However, the plaintiffs cannot negate the existence of the collective bargaining agreement. Although the plaintiffs may be able to show that the employer gave to non-bargaining unit members all of the *tangible* benefits that were given to bargaining unit members, *see* Complaint at 6, they will not be able to show that the employer's decisions regarding non-bargaining unit members were restricted by the many *intangible* considerations inherent in collective bargaining.

A second reason for our affirmance of the dismissal of Count One is the federal policy of judicial nonintervention in the collective bargaining process. As noted earlier, employers' and unions' faith in the ability of the collective bargaining process to provide solutions to problems in labor relations greatly de-

pends on such nonintervention. A policy of refusing to enforce collective bargaining agreements and of imposing contractual modifications on parties to such agreements would drastically reduce the incentive of those parties to work toward negotiated solutions. Under such a policy, parties to and agreement would face the potential of their opposition turning to the courts for assistance in accomplishing goals not achieved at the negotiating table. Such a result would be contrary to the well-established federal policy goal of fostering collective bargaining as the means of resolving employer-union disputes.

The federal policy of judicial nonintervention in the collective bargaining process must of course give way to the federal policy, embodied in Title VII, of eliminating racially-discriminatory employment practices. Thus, the courts have held that Title VII imposes an affirmative duty on employers to modify collective bargaining agreements which are discriminatory in their application. *See, e.g., United States v. Jacksonville Terminal Co.,* 451 F.2d 418 (5th Cir.1971). This exception to the policy of nonintervention has not been extended, however, to cases where the product of the collective bargaining process is a nondiscriminatory agreement. Under such circumstances, the policies of Title VII are not implicated to the extent necessary to override federal labor policy.

A final reason for refusing to accommodate the plaintiffs' request for a modification of the collective bargaining agreement in this case is that minority union members will not be without a remedy as a result of this refusal. If minority union members are dissatisfied with the terms of their collective bargaining agreement, they have the option of electing a new bargaining representative or leaving the union altogether. If they choose the latter option, Title VII will provide them with a potential remedy whenever their employer offers similarly-situated nonminority members more favorable treatment.

When minority union members choose collective bargaining as a means of remedying unfavorable employment conditions, they sacrifice any right to complain of more favorable treatment of non-union employees. Collective bargaining provides many

benefits and protections that are unavailable to non-union members; however, assurance of equal treatment with those who elect not to utilize the collective process is not one of those protections. By electing a collective bargaining representative, minority workers accept the responsibility of adhering to the terms of any non-discriminatory agreement negotiated in good faith by that representative.

II. Count Two: Refusal to Hire

In Count Two of the Complaint, the plaintiffs allege that "management perpetuated a policy that was discriminatory [sic] in that positions ineligible for union membership, such as clerical employees, mechanics, watchmen, office janitors and jobs [sic] were all occupied by whites, but are not considered traditional management positions." They further allege that such employees "were granted the same benefits that union members received as a result of the union's negotiations, such as holidays and birthdays off," but that "union members were not granted the same benefits that non union/non-bargaining unit employees received, such as time off to attend funerals with pay and severance pay."

At first glance, Count Two appears to challenge the dissimilar treatment of non-union employees to establish Title VII discrimination against union members. As explained in the previous section of this Opinion, such a challenge does not state a claim of Title VII discrimination.

Our inquiry into the allegations of Count Two does not end there, however. In reviewing a dismissal for failure to state a claim, we are obligated to construe the complaint in a light most favorable to the plaintiffs and assume all allegations to be true. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). Construing Count Two in a light most favorable to the plaintiffs, we find that the plaintiffs seek to prove that the positions held by non-union members were denied to them in violation of Title VII. Under this interpretation of Count Two, the plaintiffs would establish racial discrimination by showing that the defendants chose non-minority

members over minorities in filling the more favorable non-union jobs. Our analysis of the denial of severance benefits challenged in Count One does not preclude the plaintiffs from pursuing this refusal-to-hire theory.

In dismissing the plaintiffs' complaint, the district court stated that 29 U.S.C. § 158(a)(5) required the employer to deny severance benefits to the plaintiffs pursuant to the terms of the collective bargaining agreement. The court apparently believed that the plaintiffs were challenging the denial of severance benefits in all of their counts. Because we read Count Two as setting forth a theory separate and apart from that which was set forth in Count One, we reverse. On remand, the district court should provide the plaintiffs with an opportunity to better articulate their refusal-to-hire theory in an amended complaint.

III. Equal Pay Act Claim

While we do not agree that § 8(a)(5) of the NLRA precludes the plaintiffs' second Title VII claim, we do agree with the trial court's decision to dismiss the Equal Pay Act claim for relief. The Equal Pay Act applies to disparities in pay between male and female employees. Not only does the complaint fail to allege any differences in pay or benefits based on gender, it fails even to assert the gender of the plaintiffs, of other members of the class that the plaintiffs purport to represent, or of the non-union employees who received severance pay. In short, the complaint makes no reference to gender whatsoever. Under these circumstances, the district court correctly concluded that the plaintiffs' allegations in this regard are not sufficient.

For the foregoing reasons, the district court's dismissal of Count One of the complaint is AFFIRMED; the district court's dismissal of Count Two of the complaint is REVERSED; the district court's dismissal of the complaint against Western Grain for insufficiency of service of process is VACATED; the district court's dismissal of Count Three of the complaint is AFFIRMED; and the case is REMANDED for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7761

D.C. Docket No. 86-0832

OLIVER MARSHALL, et al.,

Plaintiffs-Appellants,

versus

WESTERN GRAIN COMPANY, INC., and
THE RIVERSIDE GROUP, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

Before FAY, Circuit Judge, HENDERSON*, Senior Circuit Judge, and BLACK**, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED in part and REVERSED in part, VACATED in part; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

*See Rule 34-2 (b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Susan H. Black, U.S. District Judge for the Middle District of Florida, sitting by designation.

It is further ordered that each party bear their own costs on appeal.

Entered: March 1, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/ KARLEEN MCNABB
Deputy Clerk

ISSUED AS MANDATE: Apr 14 1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7761

OLIVER MARSHALL, et al.,

Plaintiffs-Appellants,

versus

WESTERN GRAIN COMPANY, INC., and
THE RIVERSIDE GROUP, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC
(Opinion March 1, 1988, 11 Cir., 1988, ... F.2d .....).
(April 6, 1988)

Before FAY, Circuit Judge, HENDERSON, Senior Circuit Judge, and BLACK*, District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ PETER T. FAY

United States Circuit Judge

*Honorable Susan H. Black, U.S. District Judge for the Middle District of Florida, sitting by designation.